



Commonwealth of Massachusetts State Ethics Commission

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PUBLIC ENFORCEMENT LETTER 99-2

Dear Mr. Devlin:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by receiving compensation from and acting as an agent for private architectural clients in relation to matters pending before the Springfield Historical Commission, of which you were a member. Based on the staff's inquiry (discussed below), the Commission voted on July 22, 1998, to find reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §17(a) and (c).

For the reasons discussed below, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You are a private architect and the president of William J. Devlin AIA, Inc., a small architectural firm. You were appointed to the Springfield Historical Commission ("the SHC") in June 1992 by Mayor Robert T. Markel.^{1/}

2. Pursuant to the Historic Districts Act, G.L. c. 40C, no building within an historic district shall be constructed or altered "in any way that affects exterior architectural features" unless the historic commission issues a certificate of appropriateness, non-applicability or hardship with respect to such construction or alteration. *Id.* §6. A person desiring such certificate shall file an application together with such plans, specifications or other information as may enable the historic commission to make its determination. *Id.* Such certificate is a prerequisite to issuance of a building permit. *Id.* In determining matters before it, the historic commission "shall not consider interior arrangements or architectural features not subject to public view." *Id.* §7.

3. From about 1984 until your appointment to the SHC in June 1992, you would regularly attend SHC hearings out of personal interest and voluntarily provide photographic services to the board. In August 1987, SHC Chair Francis Gagnon asked if you would like to be on the

SHC. Your response was positive, and throughout the following years, you expressed your continued interest in an appointment to a series of mayors and to Gagnon.

4. In a September 4, 1987 letter to Gagnon, you restated certain items that the two of you had discussed about an appointment, including your understanding that when “proposing work at my own houses, or representing a client’s project, I simply abstain from voting, and can go to the petitioners’ side of the table as I deem necessary.” In a September 10, 1990 letter to Gagnon, you again stated your understanding that there was no restriction on your taking work as an architect in the various historical districts. Rather, you explained in the letter, when one of your jobs was being heard, you would excuse yourself as commissioner, make your presentation from the other side of the table and abstain from the voting. You also requested in that letter that Gagnon send you any written guidelines, handbook or appropriate statutes on being a commissioner.^{2/}

5. Just before your June 1992 appointment, you met with a city council subcommittee. You told us that at that meeting, you informed the subcommittee and Gagnon that you intended to do architectural work in Springfield that you would submit to your own board. No one stated any problem with your doing so. You understood, however, that you could not vote on matters when you represented clients before your board.

6. Your reappointment to the SHC was approved in April 1994.

7. On March 23, 1994, the McKnight Neighbor-hood Council, Inc. filed an application for a certificate of appropriateness from the SHC regarding installation of a handicap-access ramp on property within the historic district.^{3/} The application included plans prepared by you, but your handwriting did not appear on the application (as it had on previous applications). You expected to make the presentation on behalf of your client at the April 21, 1994 hearing.

8. According to you, Gagnon spoke with you just prior to the April 21, 1994 hearing and informed you that you should not represent people before your own board. You were upset by the short notice of this restriction, but you briefed your client on the presentation and stayed out of the room. You did not vote on the matter.

9. Thereafter, you expected to receive further conflict of interest advice from the city’s legal department, but you did not hear from anyone. Thus, your understanding was that you could continue to submit work to the SHC, but you could not make the presentations yourself.

10. On May 10, 1994, you executed a contract with the Mental Health Association of Greater Springfield, Inc. (“the Mental Health Assoc.”), which you had represented before your board in 1993.^{4/} Pursuant to the contract, you would provide architectural services to renovate a building at 30 High Street as a six-bedroom shelter.^{5/} Your compensation for basic architectural services — including design, drawings and specifications — was \$16,200.^{6/}

11. Sometime in May 1995 the Mental Health Assoc. filed an application for a certificate of appropriateness from the SHC regarding the renovations to 30 High Street; your handwriting does not appear on the application. The application stated the proposed change as follows:

Renovation of building to include restoration of front portion. Repair and restoration of rear portion. Alterations to include raising roof of rear portion and changing windows in rear portion. See accompanying drawings submitted under separate cover.

You had prepared the plans and architectural designs submitted to the SHC but did not plan to make the presentation at the public hearing, which was scheduled for June 1, 1995.^{7/}

12. On June 1, 1995, the date of the Mental Health Assoc. hearing, you received a letter dated May 31, 1995, from Deputy City Solicitor Harry P. Carroll. Carroll's letter constituted a legal opinion concerning the Mental Health Assoc.'s application on which you were listed as the architect of record. Carroll advised you on the restrictions of §17(a) and (c) for a special municipal employee. Carroll informed you that as you were a member of the SHC, any application filed with the SHC was a subject of your official responsibility. Thus, you could not "act as an agent for any person or entity filing an application with" the SHC and could not receive direct or indirect compensation from anyone other than the city in relation to any particular matter which was the subject of your official responsibility. Carroll further advised you "to refrain from acting as an agent for, or receiving compensation from, any party appearing before" the SHC, and "from participating or voting as a member of [the SHC] with respect to the application filed by" the Mental Health Assoc. without a determination from the Ethics Commission that such conduct was permissible. Carroll instructed you on how to request an opinion from the Ethics Commission. The letter was copied to the SHC.^{8/}

13. You told us that you received Carroll's opinion letter in the afternoon of June 1, 1995, and spoke briefly with Carroll prior to that evening's hearing.

14. Mary Wallachy of the Mental Health Assoc. made the presentation on the evening of June 1, 1995. You left the room and abstained from any official participation in the vote. The SHC approved the renovation plans.

15. You received a total of \$16,200 from the Mental Health Assoc. for the base project and an additional \$1,780 for the "restoration-oriented historic work." You received your first payment in March 1995, two payments in June 1995, two payments in late November 1995, two payments in December 1995, one payment in late January 1996, and the full payment for the restoration-oriented work (\$1,780) in late August 1996.

16. By letter dated December 20, 1995, you sought an opinion from the Ethics Commission regarding the May 31, 1995 opinion from Carroll.^{9/} You provided a history of your work with the SHC, including your three client representations in 1993 and your last-minute withdrawal from a presentation on April 21, 1994. You indicated that you had had a number of other projects in historic districts that did not get as far as reviews. You also noted that you had a current contract with the Mental Health Assoc. to provide standard architectural services, for which you expected a major fee. You stated in your letter that it seemed natural to you that the architect on the SHC would have historic district projects, and you had been clear about that from the beginning.

17. A February 1, 1996 informal advisory opinion from the Legal Division informed you that the Legal Division concurred with Carroll's opinion, and provided the principles behind §17. The opinion clarified that "acting on behalf of" included signing documents or submitting applications for another, and that any application filed with the SHC was clearly within your official responsibilities even if you refrained from official participation in the matter.^{10/}

18. On February 1, 1996, the mayor of Springfield officially removed you from the SHC based on your alleged violations of chapter 268A.^{11/}

19. Former SHC members told us that you were particularly conscientious about ethical issues. They also stated that prior to 1994 SHC members were unaware that they could not represent clients before the board.

II. Discussion

As a former member of the SHC you were a special municipal employee and, as such, subject to the following sections of G.L. c. 268A.

Section 17(a) prohibits a municipal employee, otherwise than as provided by law, from receiving or requesting compensation from anyone other than the municipality in relation to any particular matter^{12/} in which the municipality is a party or has a direct and substantial interest. Section 17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest.^{13/}

In 1994 and 1995 you prepared plans that your clients submitted in support of their applications for certificates of appropriateness, but you did not write the applications or make the presentations yourself. As each of these matters concerned property within the historic district and were presented to the SHC for approval, they constituted particular matters in which the city had direct and substantial interests, and were the subject of your official responsibility. Your actions constituted acting as agent for private parties in connection with these matters. Moreover, you received compensation from private clients in relation to these matters. Accordingly, there is reasonable cause to believe that you violated §17(a) and (c).

The Commission is aware of the various efforts you made to comply with the conflict of interest law, but does not fully understand why you continued to submit documents — or allow your documents to be submitted — to your own board as late as May 1995. Arguably, you should have known by this time that you could not allow this to happen without violating §17. *Commission Advisory No. 13A* (Municipal Employees Acting as Agent) (issued in January 1993 and revised in July 1994);^{14/} *EC-COI-93-15* (selectman who is also a professional engineer may not receive compensation for preparing, nor place his professional seal on, documents to be submitted to a town agency).

III. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter — rather than pursuing a formal order which might have resulted in a civil penalty — because your conduct involved a rather subtle restriction imposed by §17: you received compensation from and acted as agent for private clients without making any personal appearances before your own board on their behalf. The Commission has never publicly resolved a §17 violation that did not involve personal appearances. Thus, your situation presents an opportunity for the Commission to educate the public on the point that a municipal employee violates §17 by receiving compensation from or acting as agent for a private party in

connection with submitting documents to a municipal board, even if the municipal employee avoids making any personal appearances before the board.

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law. This matter is now closed.

DATE: August 26, 1998

1/The SHC comprises seven members appointed by the mayor to three-year terms, unpaid. One member of the board is required to be an architect, one a real estate agent, one a historian and one a representative of the Springfield Preservation Trust.

2/You apparently did not receive anything in response to your request.

3/You told us that you received \$280 for this job.

4/You had worked on other architectural projects for the Mental Health Assoc. prior to that.

5/The project was a \$220,000 rehab on a long-vacant house to provide transitional housing and support services for homeless people with a history of mental illness. The project was to receive both state and federal funding, including funding from historical entities. The renovations were scheduled to begin in July 1995.

6/The \$16,200 was divided as follows: \$12,150 for design/documents, and \$4,050 for the construction phase. The contract also specified that your \$16,200 fee was for the “base” project — the overall scope of the work, without the restoration-oriented historic work. For that MHC (Mass. Historic Commission)-funded work, the Architect’s proposed fee is \$1,780.”

7/You provided us with a copy of your notes regarding the June 1, 1995 presentation. These indicate your intention not to make the presentation because of conflict of interest laws.

8/Carroll’s opinion does not clarify that “acting as an agent” may include submitting documents on behalf of another. Thus, your understanding at that time was that you could not appear or represent clients before the SHC, from which conduct you had refrained since April 1994. You told us that you had no understanding then regarding the submission of documents. Moreover, you believed that Carroll’s opinion did not apply retroactively to work for which you had already contracted and which you had already performed, especially where it would have left your client in a difficult situation. Since then you have refused to take on any projects which would require you to have any dealings with the SHC.

9/You told us that the six-month delay could have been because you were busy, but you also surmised that you were prompted to contact the Commission when the new mayor asked all board members to tender their resignations.

10/This appears to be the first time that you were specifically told that “acting as agent” is not limited to making personal appearances, but can include submitting documents or applications on behalf of another.

11/You later told the Legal Division that you were resigning from the SHC to pursue your private architectural practice, based on the Legal Division's opinion.

12/"Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

13/These sections of §17 apply to special municipal employees in relation to those particular matters in which the special municipal employee officially participated at any time, or which were the subject of his official responsibility within the past year. Thus, a special municipal employee is prohibited from acting privately on those matters concerning his own municipal board or agency, even if the matter is before a different municipal board or agency.

14/This advisory states that submitting applications or supporting documentation to a third party constitutes prohibited agency conduct, as does preparing documents that require a professional seal.